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6 **UNITED STATES DISTRICT COURT**
7 **WESTERN DISTRICT OF WASHINGTON**
8 **AT SEATTLE**

9 ROCHELLE HAMS,

10 Plaintiff,

11 v.

12 MICHAEL J. ASTRUE, Commissioner of
Social Security,

13 Defendant.

NO. C11-1205-RAJ-JPD

REPORT AND
RECOMMENDATION

14 Plaintiff Rochelle Hams appeals the final decision of the Commissioner of the Social
15 Security Administration (“Commissioner”) which denied her application for Supplemental
16 Security Income (“SSI”) under Title XVI of the Social Security Act, 42 U.S.C. §§ 401-33 and
17 1381-83f, after a hearing before an administrative law judge (“ALJ”). For the reasons set forth
18 below, the Court recommends that the Commissioner’s decision be REVERSED and
19 REMANDED.

20 I. FACTS AND PROCEDURAL HISTORY

21 At the time of the administrative hearing, Plaintiff was a 54 year old woman who had
22 not graduated from high school, but completed three years of vocational training at a
23 community college. Administrative Record (“AR”) at 25. Her past work experience includes
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1 employment as a receptionist, mail clerk, reservationist, data entry clerk, and manufacturing
2 clerk. AR at 173. Plaintiff was last gainfully employed in September 2004. AR at 173.

3 On February 26, 2007, Plaintiff filed a claim for SSI payments, alleging an onset date
4 of July 18, 2002. AR at 15, 167. Plaintiff asserts that she is disabled due to fibromyalgia,
5 myofacial pain, bipolar disorder, cervical strain, and anxiety. AR at 172.

6 The Commissioner denied Plaintiff's claim initially and on reconsideration. AR at 82-
7 90, 93-95. Plaintiff requested a hearing which took place on September 2, 2009. AR at 27.
8 On September 30, 2009, the ALJ issued a decision finding Plaintiff not disabled and denied
9 benefits based on his finding that Plaintiff could perform a specific job existing in significant
10 numbers in the national economy. AR at 15-26. Plaintiff's administrative appeal of the
11 ALJ's decision was denied by the Appeals Council, AR at 1-4, making the ALJ's ruling the
12 "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). On July
13 20, 2011, Plaintiff timely filed the present action challenging the Commissioner's decision.
14 Dkt. No. 1.

15 II. JURISDICTION

16 Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§
17 405(g) and 1383(c)(3).

18 III. STANDARD OF REVIEW

19 Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of
20 social security benefits when the ALJ's findings are based on legal error or not supported by
21 substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th
22 Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is
23 such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
24 *Richardson v. Perales*, 402 U.S. 389, 201 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750

1 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in
2 medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,
3 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
4 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
5 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
6 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
7 must be upheld. *Id.*

8 The Court may direct an award of benefits where "the record has been fully developed
9 and further administrative proceedings would serve no useful purpose." *McCartey v.*
10 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
11 (9th Cir. 1996)). The Court may find that this occurs when:

12 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
13 claimant's evidence; (2) there are no outstanding issues that must be resolved
14 before a determination of disability can be made; and (3) it is clear from the
record that the ALJ would be required to find the claimant disabled if he
considered the claimant's evidence.

15 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
16 erroneously rejected evidence may be credited when all three elements are met).

17 IV. EVALUATING DISABILITY

18 As the claimant, Ms. Hams bears the burden of proving that she is disabled within the
19 meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
20 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in
21 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is
22 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§
23 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if her impairments
24 are of such severity that she is unable to do her previous work, and cannot, considering her age,

1 education, and work experience, engage in any other substantial gainful activity existing in the
2 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-
3 99 (9th Cir. 1999).

4 The Commissioner has established a five step sequential evaluation process for
5 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
6 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
7 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
8 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
9 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
10 §§ 404.1520(b), 416.920(b).¹ If she is, disability benefits are denied. If she is not, the
11 Commissioner proceeds to step two. At step two, the claimant must establish that she has one
12 or more medically severe impairments, or combination of impairments, that limit her physical
13 or mental ability to do basic work activities. If the claimant does not have such impairments,
14 she is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
15 impairment, the Commissioner moves to step three to determine whether the impairment meets
16 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
17 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
18 twelve-month duration requirement is disabled. *Id.*

19 When the claimant’s impairment neither meets nor equals one of the impairments listed
20 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
21 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
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23 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §
404.1572.

Commissioner evaluates the physical and mental demands of the claimant's past relevant work to determine whether she can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the claimant is able to perform her past relevant work, she is not disabled; if the opposite is true, then the burden shifts to the Commissioner at step five to show that the claimant can perform other work that exists in significant numbers in the national economy, taking into consideration the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g), 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable to perform other work, then the claimant is found disabled and benefits may be awarded.

V. DECISION BELOW

On September 30, 2009, the ALJ issued a decision finding the following:

1. The claimant has not engaged in substantial gainful activity since February 26, 2007, the application date.
2. The claimant has the following severe impairments: fibromyalgia, bipolar disorder, anxiety disorder and personality disorder.
3. The claimant does not have an impairment or combination of impairments that meets or medically equals any of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
4. After careful consideration of the entire record, the undersigned finds that the claimant has the residual functional capacity on a sustained basis for a significant period of time (e.g. five days a week, 8 hours per day, day after day, week after week, month after month, with a 1/2 hour lunch break and a 1/4 hour break in the morning and in the afternoon) to perform light work as defined in 20 CFR. § 416.967(b) with an ability to lift and carry 20 pounds occasionally and 10 pounds frequently with a sit/stand option at will and an ability to walk 4 hours in an 8-hour workday. Her ability to push/pull and fine/gross dexterity is unlimited. The claimant is able to occasionally climb stair but no ladders, ropes, scaffolds, or running. She is able to occasionally bend, stoop, crouch, crawl, balance, twist, and squat, but should not have any exposure to heights or dangerous machinery. Mentally, the claimant is able to get along with others, understand simple instructions, concentrate and perform simple tasks, respond and adapt

1 to workplace changes and supervision but in a limited
2 public/employee contact setting.

3 5. The claimant is capable of performing past relevant work as a mail
4 clerk. This work does not require the performance of work-related
5 activities precluded by the claimant's residual functional capacity.

6 6. The claimant has not been under a disability, as defined in the Social
7 Security Act, since February 26, 2007, the date the application was
8 filed.

9 AR at 17-26.

10 VI. ISSUES ON APPEAL

11 The principal issues on appeal are:

- 12 1. Whether remand is necessary because the ALJ did not make any findings
13 regarding how long Plaintiff can sit or stand in a regular workday or at one time.
- 14 2. Whether the ALJ's step four finding is supported by substantial evidence and
15 free of legal error when the ALJ found Plaintiff was limited to simple tasks, but
16 found she could work as a mail clerk, a job which requires a higher reasoning
17 level.
- 18 3. Whether the ALJ gave specific and legitimate reasons for rejecting the opinions
19 of Don Schimmel, Ph.D.

20 Dkt. No. 14 at 1-2.

21 VII. DISCUSSION

22 A. The ALJ Erred Failing to Determine Plaintiff's Capacity for Sitting and Standing.

23 In the ALJ's RFC assessment, the ALJ noted that the state agency reviewing physician,
24 Robert Hoskins, M.D., found that Plaintiff could "stand and/or walk about 6 hours out of an 8-
hour workday, and sit about 6 hours out of an 8-hour workday." AR at 23. The ALJ did not
explicitly adopt Dr. Hoskins's findings as his own, but did find that Plaintiff could perform
light work "with a sit/stand option at will." AR at 19. Because the ALJ did not explicitly find
how much time Plaintiff could sit or stand during a regular work day, Plaintiff argues that
remand is required under Social Security Ruling ("SSR") 96-8p.

1 The Commissioner concedes that the ALJ did not explicitly find, in the section of his
2 decision explaining his RFC assessment, that the Plaintiff could sit or stand for six out of eight
3 hours during a work day. *See* Def.’s Br. (Dkt. 16-1) at 5. Nonetheless, the Commissioner
4 contends that because the ALJ ascribed “great weight” to Dr. Hoskins’s assessment, and Dr.
5 Hoskins found that the Plaintiff could stand or walk for six out of eight hours a day and sit for
6 six out of eight hours a day, the Court should conclude that the ALJ adequately addressed
7 Plaintiff’s ability to sit and stand.

8 Even if Dr. Hoskins’s findings were imputed to the ALJ, those findings are not
9 sufficiently specific to comply with Social Security Ruling (“SSR”) 96-8p, which instructs:

10 The RFC assessment must address both the remaining exertional and
11 nonexertional capacities of the individual.

12 Exertional capacity addresses an individual’s limitations and restrictions of
13 physical strength and defines the individual’s remaining abilities to perform
14 each of seven strength demands: Sitting, standing, walking, lifting, carrying,
15 pushing, and pulling. Each function must be considered separately (e.g., “the
16 individual can walk for 6 out of 8 hours and stand for 6 out of 8 hours”), even if
the final RFC assessment will combine activities (e.g., “walk/stand, lift/carry,
push/pull”). . . .

It is especially important that adjudicators consider the capacities separately
when deciding whether an individual can do past relevant work. . . .

17 The Commissioner does not address SSR 96-8p at all in his brief, nor explain why the ALJ did
18 not need to explicitly address the Plaintiff’s separate capacities to sit and stand when assessing
19 the Plaintiff’s RFC. The ALJ’s failure to follow the instructions of SSR 96-8p when crafting
20 the RFC was error.² *See Arik v. Astrue*, 2010 WL 2557493 *3 (N.D. Cal. Jun. 21, 2010)

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22 ² The Plaintiff also argues that the ALJ’s finding that she could stand or sit at will was
23 not sufficient because the ALJ failed to specify how long Plaintiff could remain sitting or
24 standing. *See* Pltf.’s Reply (Dkt. 17) at 2. The Commissioner did not address this argument,
other than to suggest (without any evidence) that a mail clerk should be able to structure his or
her day to sit or stand for less than six hours a day. *See id.* On remand, the Court instructs the

1 (affirming reversal and remand for ALJ's failure to follow SSR 96-8p). On remand, the ALJ
2 shall enter explicit findings regarding the Plaintiff's separate abilities to sit and stand.

3 B. The ALJ Erred in Finding that Plaintiff Could Work as a Mail Clerk or in the
4 Alternative Jobs Suggested by the Vocational Expert.

5 A vocational expert testified at Plaintiff's hearing before the ALJ, stating that Plaintiff
6 could perform her past relevant work as a mail clerk. *See* AR at 63-65. The vocational expert
7 described the mail clerk position as "light duty," "unskilled," "limited public" exposure, and
8 "fairly simple." AR at 63-64. The ALJ found that the Plaintiff was limited to simple tasks
9 with simple instructions, and included those limitations in his hypothetical question to the
10 vocational expert. *See* AR at 19, 64.

11 The Plaintiff contends that the ALJ's finding of Plaintiff's limitations to simple tasks
12 with simple instructions is inconsistent with the ALJ's finding that Plaintiff could work as a
13 mail clerk, given that (according to the Dictionary of Occupational Titles) a mail clerk position
14 requires a GED reasoning level of three. The Commissioner argues that Plaintiff's position is
15 mistaken "because GED measures the general educational development required for a
16 particular job, and not the specific tasks that are performed in working at a job." Def.'s Br. at
17 6. According to the Commissioner, "there is nothing inherent in a GED level of three that
18 would make it incompatible with her [RFC]." *Id.* at 7 (citing *Renfrow v. Astrue*, 496 F.3d 918,
19 921 (8th Cir. 2007) (finding that a limitation to "unskilled" work is not inconsistent with ability
20 to work at a job requiring a GED level of three)).

21 The Commissioner relies exclusively on *Renfrow*, an Eighth Circuit opinion, but
22 ignores the "[n]umerous district courts in this Circuit [that] have held that a limitation to
23 simple, repetitive tasks is inconsistent with Reasoning Level 3 jobs." *Grimes v. Astrue*, 2011

24 ALJ to comply with SSR 96-8p to determine explicitly how many hours Plaintiff can sit and
stand during an eight-hour workday.

1 WL 164537 *4 (C.D. Cal. Jan. 18, 2011) (citing *Bagshaw v. Astrue*, 2010 WL 25644 *5 (C.D.
2 Cal. 2010); *McGensy v. Astrue*, 2010 WL 1875810 *3 (C.D. Cal. 2010); *Rich Pham v. Astrue*,
3 695 F. Supp. 2d 1027, 1032 n.7 (C.D. Cal. 2010); *Etter v. Astrue*, 2010 WL 4314415 *3 (C.D.
4 Cal. 2010); *Pak v. Astrue*, 2009 WL 2151361 *7 (C.D. Cal. 2009); *Tudino v. Barnhart*, 2008
5 WL 4161443 *11 (S.D. Cal. 2008); *Squier v. Astrue*, 2008 WL 2537129 *5 (C.D. Cal. 2008)).

6 As in *Grimes*, the ALJ here asked the vocational expert whether his testimony was
7 consistent with the Dictionary of Occupational Titles, but the vocational expert did not address
8 the reasoning level required for the mail clerk position. See AR at 64-65. Without an
9 explanation of how Plaintiff could be both limited to performing simple tasks with simple
10 instructions, but could also perform a job requiring a GED level of three, the ALJ's finding that
11 Plaintiff could perform her past relevant work is not supported by substantial evidence.

12 The Commissioner argues that even if the ALJ erred in finding that Plaintiff could
13 perform her past relevant work, this error is harmless because the ALJ proceeded to step five
14 and found that the Plaintiff could adjust to other work as an assembler, basket filler, and
15 agricultural sorter. See AR at 25. It is true that the vocational expert testified that these
16 representative jobs would be consistent with the hypothetical question posed by the ALJ (see
17 AR at 65), but the ALJ's hypothetical did not specify how many hours per day the hypothetical
18 claimant was able to sit or stand. See *supra*, Part VII.A. The Plaintiff's attorney asked the
19 vocational expert about the hypothetical claimant's need to stand and sit, and the vocational
20 expert testified that in order to perform a data entry clerk position, a person would have to be
21 able to sit for at least six hours a day. See AR at 66-67. It is unclear from the record, however,
22 how a person's ability to sit and stand would affect his or her ability to perform the alternative
23 positions identified by the vocational expert. Thus, the ALJ's analysis at step five does not
24 provide an alternative basis to affirm. On remand, the ALJ shall enter specific findings about

1 the Plaintiff's ability to sit and stand, and shall include those limitations in any hypothetical
2 question posed to a vocational expert.

3 C. The ALJ Did Not Err in Discounting the Opinions of Don Schimmel, Ph.D.

4 An ALJ must provide specific and legitimate reasons, supported by substantial
5 evidence, for rejecting a controverted opinion of an examining provider. *See Lester v. Chater*,
6 81 F.3d 821, 830-31 (9th Cir. 1995). The parties dispute whether the ALJ's reasons for
7 discounting the opinions of Don Schimmel, Ph.D., satisfy this burden.

8 The ALJ's decision explains why the ALJ discounts the opinions of Dr. Schimmel, who
9 evaluated Plaintiff multiple times, and other providers:

10 . . . [A]t various times, it was expressed that the claimant was unable to
11 function independently, unable to live independently, unable to hold a job and
12 had restricted mobility, agility or flexibility in her ability to balance, bend,
13 climb, crouch, handle, kneel, pull, push, reach and stoop. However, the
14 progress notes as well as the objective and clinical findings annotated during
15 office visits fails to corroborate the assessments. For example, on March 13,
16 2007, it was expressed that these limitations were expected to last for at least 12
17 months *without medical treatment*. There was no mention of the claimant's
18 ability to function with treatment. In addition, upon examination in March
19 2007, the claimant was found to have normal gait and station. Cardiovascular
20 and respiratory examinations were normal. Also, on April 2, 2007, the claimant
was described as cooperative and was oriented times three. She was able to
remember what she had for dinner the night before, as well as remember 2 of 3
objects immediately and 2 out of the same objects after 5-minute and 10-minute
delays. She was aware of current events and able to recall the current president
of the United States. Further, the claimant was able to spell "WORLD" forward
and backwards. In addition, in August 2009, the claimant's attention,
concentration and memory were all within normal limits. There was no
evidence of any significant deficits in her ability to interact with the evaluating
physician. Based on the objective medical evidence considered as a whole,
little weight is afforded to these unsupported assessments.

21 AR at 23-24 (citations omitted, emphasis in original). According to the Plaintiff, the reasons
22 provided here by the ALJ for discounting *inter alia* Dr. Schimmel's opinions are insufficient
23 because the evidence cited does not actually contradict Dr. Schimmel's opinions. Whether
24 Plaintiff was, for example, cooperative and oriented times three and could remember the name

1 of the United States president is not particularly relevant to whether Plaintiff could live and
2 function independently, especially given that the exhibit relied upon by the ALJ also includes
3 reports that Plaintiff was feeling depressed and anxious, had problems concentrating and
4 remembering, experienced difficulty completing her train of thought, and experiencing
5 pervasive pain. *See, e.g.*, AR at 575, 582, 608.

6 The Commissioner cites to other sections of the ALJ's ruling to argue that in light of
7 the record as a whole, the ALJ "fairly concluded from the record that Plaintiff was not as
8 mentally impaired as Dr. Schimmel believed." Def.'s Br. at 9:3-4. In particular, the
9 Commissioner directs the Court to consider the ALJ's findings with regard to the Paragraph B
10 criteria, specifically Plaintiff's activities of daily living and her social functioning. *See* AR at
11 18. The Commissioner does not analyze whether the articulated reasons provided by the ALJ
12 for discounting Dr. Schimmel's opinions are specific and legitimate, but only urges the Court
13 to consider other sections of the ALJ's decision in reviewing the ALJ's grounds for
14 discrediting Dr. Schimmel's opinions.

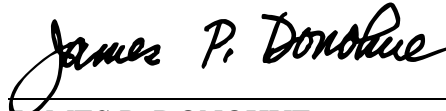
15 Such an expansive review, however, is not appropriate on appeal, because the Court is
16 constrained to review an ALJ's ruling only on the basis of the reasons the ALJ provides for
17 that ruling. *See Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007) ("We review only the reasons
18 provided by the ALJ in the disability determination and may not affirm the ALJ on a ground
19 upon which he did not rely."). Thus, it would be error for this Court to affirm the ALJ's ruling
20 regarding Dr. Schimmel's opinions on the alternative grounds proposed by the Commissioner.
21 Because the Commissioner does not contest Plaintiff's argument that the reasons stated in the
22 decision for discounting Dr. Schimmel's opinions are insufficient, and the Court agrees that the
23 reasons provided do not specifically explain why Dr. Schimmel's opinions should be afforded
24 less weight, the Court finds that the ALJ failed to sufficiently justify his analysis of Dr.

1 Schimmel's opinions. On remand, the ALJ shall reconsider the weight to be afforded Dr.
2 Schimmel's opinions.

3 VIII. CONCLUSION

4 For the foregoing reasons, the Court recommends that this case be REVERSED and
5 REMANDED to the Commissioner for further proceedings not inconsistent with the Court's
6 instructions. A proposed order accompanies this Report and Recommendation.

7 DATED this 29th day of March, 2012.

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10 JAMES P. DONOHUE
11 United States Magistrate Judge
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